IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 8914 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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DAUD IBRAHIMBHAI MIYANA

Versus

COMMISSIONER OF POLICE

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Appearance:

1. Special Civil Application No. 8914 of 2004

MR ANIL S DAVE for Petitioner No. 1

MR HM PRACHCHHAK AGP for Respondent No. 1-3

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CORAM : HON'BLE MR.JUSTICE J.R.VORA

Date of decision: 10/01/2005

ORAL JUDGEMENT

1. This petition is filed by the petitioner under Article 226 of the Constitution of India challenging the order passed by Police Commissioner, City of Ahmedabad,

on 1st of July, 2004 in exercise of powers conferred upon him under Section 3(1) of the Gujarat Prevention of Anti Social Activities Act, 1985 (PASA Act for short). The petitioner was declared as bootlegger and came to be detained in pursuance of said order from 1st of July, 2004.

2. The grounds for detention as has been served upon the petitioner and placed on record reveal that in all seven crimes came to be registered against the petitioner at different Police Stations under Sections 66-B, 65-E 81 and 116 (1)B of the Bombay Prohibition Act. Offences came to be registered on 27th of May, 2003, 3rd of September 2003, 3rd of September, 2003, 16th of May 2004, 21st of May 2004,23rd of May 2004 and on 26th of May 2004. It was alleged that country liquor of 3 liters, 14 liters, 50 liters, 37 liters, 64 liters, 18 liters and 576 liters was found in possession of the petitioner and seized by the police. In first three offences registered against the petitioner he was released on bail while in next four offences petitioner was arrested on 28th of June, 2004 and was in custody when order for detention came to be passed against him. The detaining authority took into consideration investigation papers of all the seven crimes registered against the petitioner and came to the conclusion that bootlegging activities of the petitioner was required to be curtailed and prevented immediately as the illegal activities of the petitioner was prejudicial to public health and maintenance of public order. Detaining authority considered that the action against the petitioner under Section 93 of the Bombay Prohibition Act or under Section 57-C of the Bombay Police Act was likely to take time and therefore immediate action was required to prevent the bootlegging activities of the petitioner. The detaining authority also considered that at the time of passing the order of detention, the petitioner was in custody in last four cases registered against him but he was likely to file bail application at any time and was likely to be released on bail and was likely to continue bootlegging activities and hence the detaining authority passed the above said order which is challenged in this petition.

3. Learned Advocate Mr. Anil S. Dave for the petitioner and learned AGP Mr. H.M. Prachchhak for the respondents were heard at length. The affidavit-in-reply filed by the detaining authority as placed on record by learned AGP is also taken into consideration.

4. The order of detention came to be challenged by learned Advocate for the petitioner on various grounds.

Mainly, it was contended that the order of detention suffers from the vice of non-application of mind by the detaining authority as there was no credible material to reach the subjective satisfaction that the petitioner was storing, transporting and selling country liquor which affected public health and thereby maintenance of public order was disturbed. It was contended that first three cases registered against the petitioner under the Bombay Prohibition Act, which are taken into consideration by the detaining authority are stale cases of 2004, while next four cases came to be registered against the petitioner in the month of May 2004. It was urged that merely registration of offences against the petitioner under the Bombay Prohibition Act would not itself lead to an inference that activities of the petitioner was adversely affecting the public health and maintenance of public order. To reach to this subjective satisfaction, according to learned Advocate for the petitioner, some other cogent and credible material was required and there was total absence of such material in the present case. It was also contended that last case came to be registered against the present petitioner on 26th of May, 2004 and order of detention was passed on 1st of July, 2004 and hence there was delay in passing detention order, vitiating the same. Learned Advocate for the petitioner relied upon certain decisions in support of his contention. It was urged that the application be allowed and the order under challenge be quashed and set aside.

5. On the other hand learned AGP Mr. Prachchhak contended that as many as 7 cases came to be registered against the petitioner at different Police Stations within the span of one year. It was contended that it cannot be said that the cases registered in the year 2003 which are stale cases. It was contended that it clearly appears from the grounds that after releasing on bail in first three cases in the year 2003, petitioner continued his activities and result whereof other four cases were registered against the petitioner in the month of May 2004. In four cases, country liquor to the extent of 576 liters was found from the petitioner. It was contended that therefore the petitioner was indulged in activity of selling, storing and transporting of country liquor, which resulted in affecting public health adversely and disturbing of maintenance of public order. It was contended that therefore the detaining authority rightly reached to the subjective satisfaction that the activities of the petitioner was required to be prevented forthwith and other measures would be of no avail. It was contended that the application therefore is required

to be quashed and set aside.

6. Going through the grounds of detention and other papers placed on record and evaluating the contentions raised, what is required to be decided is whether the registration of 7 cases against the present petitioner under the Bombay Prohibition Act would ipso facto a credible material to reach to the subjective satisfaction that public health was adversely affected thereby and maintenance of public order was disturbed.

7. Admittedly as mentioned in affidavit-in-reply, the detaining authority examined the documents relating to the seven cases registered against the detenue and from that material the detaining authority formed an opinion that the detenue was dealing in illegal liquor business and was disturbing the public order, public peace and public health. The continuance of the anti-social and bootlegging activity may cause grave or widespread danger to the life, property and public health.

8. In similar circumstances, Division Bench of this Court in Letters Patent Appeal No.223 of 2000 in Spl. C.A. No.559 of 2000, in the matter of Ashok Balabhai Makwana vs. State of Gujarat, as decided on 22nd of August, 2000, when question came up for consideration, observed in paras 4 and 5 as under :

"4. In this case of K.S. Zala v. State of Gujarat (supra), the Supreme Court also considered three earlier decisions in the case of Piyush Kantilal Mehta (supra); Omprakash (supra); and Rashidmiya (supra) and observed in para 4 that in none of the three cases relied upon by the learned counsel, the point whether public order can be said to have been disturbed on the ground that the activity of the detenu was harmful to the public health arose for consideration and that the detaining authority has not recorded such satisfaction; moreover in these three cases the detaining authority has referred to some incidents of beating but there was no material to show that as a result thereof even tempo of public order was disturbed, whereas in the case before the Supreme Court in the case of K.S. Zala v. State of Gujarat (supra) the detaining authority has specifically stated in the grounds of detention that selling of liquor by the petitioner and its consumption by the people of that locality was harmful to their health. It was also stated that the statements

of the witnesses clearly show that as a result of violence resorted to by the petitioner even tempo of public life was disturbed in those localities for some time. That material on record clearly shows that the members of public of those localities had to run away from there or to go inside their houses and close their doors.

5. If we examine the present case on the anvil of the test which has been applied by the Supreme Court in the case of K.S. Zala v. State of Gujarat (supra), i.e. with regard to the presence of credible material and as to how the detaining authority has made the mention against the appellant being an obstruction to the public health and public order, we find that in the instant case so far as the statements of the witnesses which were recorded with regard to unregistered cases, that ground has been rejected by the learned Single Judge himself. It is, of course, true that after narrating the particulars of the criminal cases, the detaining authority has mentioned that the activities of the appellant were an obstacle to the public health and public order, but this bald observation cannot be taken to be decisive so as to arrive at the satisfaction that the activities of the petitioner were prejudicial to the public order or public health and that tempo of public life was disturbed. No observation made in any part of the judgment can be read in isolation and bereft the context. The judgment is to be read as a whole and even the observations which have been made by the Supreme Court in para 6 of the judgement are to be considered in light of the earlier observations made in para 5 where presence of credible material before the detaining authority has been insisted upon. Thus, litmus test to find out as to whether it is a case of breach of public order or breach of public health is concerned, credible material has to be there. In the case of K.S. Zala before the Supreme Court, the detaining authority had also relied upon the statements of the witnesses so as to show that violence resorted to by the petitioner in that case had disturbed the even tempo of public life and the material on record had shown that members of the public of those localities had to run away from there and to go inside their houses and to close their doors. No such fact situation has been mentioned in the

present case and the ground with regard to the statements of the three witnesses has been rejected by the learned Single Judge himself and it ha been held that there had been violation or infringement of the petitioner's right against such statements. In this view of the matter whatsoever said by the three witnesses with regard to unregistered cases and with regard to the three incidents referred to hereinabove, it cannot be considered to be the material germane for the purpose of consideration of the threat to the public health and public order. Thus, the only material which remains is the registered criminal cases and that by itself cannot be said to be a material for the purpose of holding that the appellant's activities had become a threat to the public order and public health. Necessary material in this regard is totally wanting in the body of the detention order itself. In large number of cases, the Supreme Court has considered that involvement in bootlegging activities even if coupled with violence does not amount to threat to public order or public health. The mere mention of allegations unless they are supported by any material cannot be said to be material germane for the purpose of arriving at the satisfaction with regard to breach of public order or public health and we find that after giving particulars of criminal cases, the detaining authority by including certain allegations, not supported by any credible material has simply observed that the appellant's activities were an obstacle to the public health and public order. In this view of the matter keeping in view the observations made by the Supreme Court in the case of K.S. Zala v. State of Gujarat (supra) itself in paras 4 and 5, we do not find that it can be held to be a case of breach of public health and public order. Learned Counsel for the appellant has also argued several other points before us, but we do not find it necessary to go into those grounds. It may be mentioned that it was not a case of breach of public order or public health and it was not argued before the learned Single Judge. Even if that be so, in such matters, the point which arises on the face of the facts of the case by the body of the order itself, which does not require further investigation of the facts, can certainly be allowed to be raised and we allow learned counsel for the appellant to raise this

point and find that this point is not without substance. The impugned order passed by the learned single Judge upholding the detention order therefore cannot be said to be in consonance with the settled position of law. The detention order deserves to be quashed and set aside on this ground alone. We, therefore, do not go into other grounds which were raised on behalf of the appellants."

9. Thus, the requirement of law is whether there was credible material before the detaining authority to reach to a subjective satisfaction that the activities of the detenue was adversely affecting the public order or public health. The only material in the present case to reach to the subjective satisfaction that the activities of the petitioner was affecting the maintenance of public order and adversely affecting public health is the fact of registration of crimes though 7 in number under the Bombay Prohibition Act against the petitioner. Registration of criminal cases itself cannot be said to be material for the purpose of holding that the petitioner's activities had become threat to the public order and public health. There is no material except the fact of registration of the criminal cases against the petitioner to reach to the subjective satisfaction that the petitioner was indulging in activities prejudicial to the maintenance of public order. In this view of the matter, the subjective satisfaction reached by the detaining authority as to disturbance of public order and public health is vitiated in absence of credible material on record. The order under challenge is required to be quashed and set aside on this ground alone.

10. In the result, the petition is allowed and the detention order passed against the petitioner under the PASA Act by Commissioner of Police, Ahmedabad City, on 1st of July, 2004, is quashed and set aside. The petitioner - Daud Ibrahimbhai Miyana is hereby ordered to be set at liberty forthwith if he is not required to be detained for any other purpose. Rule made absolute. DS permitted.

(J.R. Vora, J.)

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